



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: J&E Associates, Inc.

File: B-278771

Date: March 12, 1998

Barbara S. Kinosky, Esq., and James S. DelSordo, Esq., Kinosky, Phillips & Lieberman, for the protester.

Col. Nicholas P. Retson, Capt. Patrick B. Kernan, and Mike Lonsberry, Esq., Department of the Army, for the agency.

Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Organizational conflicts of interest exist for educational institutions submitting offers under a solicitation for educational support services where, as a contractor, the institution could advise government personnel to enroll in courses offered by that institution or verify billing statements submitted by the institution. Under such circumstances, the solicitation is required to contain a provision addressing the conflicts in accordance with Federal Acquisition Regulation Subpart 9.5.

DECISION

J&E Associates, Inc. protests request for proposals (RFP) No. DABT01-97-R-0019, issued by the Department of the Army for educational and technical support services at Fort Rucker, Alabama. J&E protests that the agency did not address organizational conflicts of interest in the RFP.

We sustain the protest.

The RFP stated the following:

C.1.1. Scope of Work. The Contractor shall provide all educational and technical support services to include management, supervisory, professional, technical, and administrative personnel to accomplish all tasks described in this contract to operate the Army Continuing Education Center (ACE-C) at Fort Rucker, Alabama.

Educational courses for service members at Fort Rucker are offered by educational institutions in the local area and elsewhere. Such courses are taught at the institution, at Fort Rucker, or by mail. The Army provides financial assistance to service members enrolling in such courses either by reimbursing the service

member for tuition payments, or by direct payments to the institution. Among the tasks required by the RFP were the following guidance and counseling services relating to a service member's selection of, or enrollment in such courses:

C.5.3.2. The contractor shall assist servicemembers in making first time course and program choices and in planning educational programs. Assist servicemembers in establishing long and short range goals, and make plans to obtain those goals through guidance and counseling on the availability of ACE-C programs and services, and in enrolling service members in appropriate programs. . . .

C.5.3.3. The contractor shall refer servicemembers, after initial guidance session, to an appropriate institution, schedule for necessary testing, and/or direct him/her to [an] appropriate workshop [developed and conducted by the contractor] for additional information or program to begin self-development activities.

In addition to guidance and counseling services, the RFP at section C.5.2.2 required the contractor to administer the tuition assistance program. This involved monitoring of the eligibility of service members for tuition assistance, and receiving and verifying billing statements from institutions for courses in which service members enroll.

The agency determined that prospective offerors would include educational institutions in the local area, as well as other institutions currently offering courses at Fort Rucker. A conflict of interest provision prohibiting such institutions from competing under the RFP was included in the draft statement of work. However, the contracting officer recommended deletion of this restriction on competition because she determined that these institutions could offer objective advice and assistance to service members, and that any potential bias in assisting in a service member's selection of courses and programs would be mitigated by the Army's direct oversight of the contractor. The final RFP did not restrict the competition. The only provision regarding conflicts of interest included in the RFP was the following:

C.1.7.4.2. Conflict of Interest. The contractor shall not employ any person whose employment would result in a real or perceived organizational conflict of interest, [or] violate the requirements of [Department of Defense] 5500.7-Regulation, Joint Ethics Regulation and Fort Rucker employment statutes and regulations or [Federal Acquisition Regulation (FAR)] § 3.104.

J&E's protest alleges that the RFP did not address the organizational conflicts of interests of an educational institution, which if awarded the contract could advise service members to enroll in its own courses and review its own tuition billing

statements. J&E alleges that the RFP must have an organizational conflict of interest provision which prohibits institutions with such potential for bias from competing under this RFP.

We agree that, given the nature of the services to be provided, the RFP must contain a provision to address the potential organizational conflicts of interest, particularly for educational institutions, and sustain the protest on this basis. However, we do not agree that the competition must necessarily be restricted to exclude such institutions.

An organizational conflict of interest exists where, because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage. FAR § 9.501; Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12. Contracting officials are to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504(a), 9.505; Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., supra. Since the regulatory guidance cannot anticipate all situations which pose potential conflicts of interest, contracting officers must exercise common sense, good judgment, and sound discretion in assessing the existence of significant potential conflicts of interest, and in developing appropriate means to resolve them. FAR § 9.505; Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., supra. We will review agency action under this subpart for reasonableness. Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., supra.

Here, as noted by the protester, if an educational institution which otherwise offers courses and programs to Fort Rucker service members receives award under this RFP, this would place it in a position to recommend that service members take courses offered by that institution and to verify billing statements submitted by its own institution. In accomplishing these contract responsibilities, it is possible that the contractor's judgment might be impaired to favor its own institutional interests, and therefore a significant organizational conflict of interest exists. See Radiation Safety Servs., Inc., B-237138, Jan. 16, 1990, 90-1 CPD ¶ 56 at 3-4 (significant organizational conflicts of interest exist where contract performance could create additional commercial work for the offeror). Given that four¹ of the nine potential sources who attended the pre-proposal conference and site visit were educational institutions, there is a significant possibility that one could receive the award.

¹These four institutions were Troy State University, Embry-Riddle Aeronautical University, Enterprise State Junior College, and Wallace Community College.

The agency's contention that no organizational conflict of interest would arise because the terms of the solicitation require the contractor to act in the interests of the service member and/or the government, not in the interests of its own institution, misses the point of regulations governing organizational conflicts of interest. The regulations contemplate that a potential organizational conflict of interest arises from a person's (including a contractor's) relationship to other entities, regardless of the person's good faith and adherence to contract requirements. FAR § 9.501; see Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., supra, at 18. The agency has not explained why an educational institution which is awarded this contract does not have at least a potential organizational conflict of interest when it advises service members as to what courses they should take, including courses given by that institution, and when it reviews vouchers submitted by itself for educational services.

To the extent the agency recognizes that an organizational conflict of interest may exist, it contends that agency oversight during contract administration would sufficiently mitigate such conflicts. However, the contract does not state how such conflicts will be mitigated, avoided, or neutralized. Mere oversight of such a contractor's activities would, at best, only identify specific instances of apparent conflicts of interest as they arise (e.g., when a service member is advised to enroll in a course with the contractor's institution). Such oversight would do nothing to avoid, mitigate, or neutralize such conflicts. Specifically, the contract would not prohibit the contractor from advising a service member to take a course with the contractor's institution. Nor does the agency state that it intends to object to such advice or enrollment, or otherwise state any guidelines identifying under what conditions such objections might be made. The contracting officer's determination that any potential conflict is mitigated through contract administration is, therefore, not reasonable.

Where, as here, significant organizational conflicts of interest reasonably can be expected, FAR § 9.507-1 states that the solicitation:

shall contain a provision that--

- (a) Invites offerors' attention to this subpart;
- (b) States the nature of the potential conflict as seen by the contracting officer;
- (c) States the nature of the proposed restraint upon future contractor activities; and
- (d) Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation.

FAR § 9.507-2 states the requirement and conditions for including such terms of restraint in a contract clause.

The current RFP does not address the significant organizational conflicts of interest discussed here² and the mitigation proposed by the contracting officer is not reasonable. We sustain the protest on these bases. However, FAR subpart 9.5 does not state a general requirement for elimination from the competition of offerors with potential conflicts of interest. Here, it may be that these organizational conflicts of interest can be avoided or otherwise mitigated by appropriate restraints on contract performance in the RFP and contract, short of eliminating educational institutions from the competition. One possible restraint is a contract clause that precludes an educational institution awarded the contract from advising service members to enroll in its courses and from reviewing its billing statements. Moreover, FAR § 9.503 provides for the possibility of the waiver of any organizational conflict of interest in accordance with agency procedures.

We recommend that the agency determine how to address the organizational conflicts of interest present here, appropriately amend the RFP, and resolicit. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1997). The protester's certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General
of the United States

²The conflict of interest provision included in the RFP addresses potential conflicts of interest of contractor employees, not those of the contractor itself, and is thus insufficient to comply with FAR subpart 9.5. Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., supra, at 16.